

New Hampshire Commission for Human Rights

COMMISSIONERS

GAIL F. PAINF, Chair
BARRY J. PALMER
CELINA A. TAMPOSI
GEORGE E. MCAVOY
GAIL G. GUNN



61 SOUTH SPRING STREET
CONCORD, NEW HAMPSHIRE 03301
TEL. (603) 271-2767

EXECUTIVE DIRECTOR

MERRYL GIBBS

DEPUTY DIRECTOR

SUSAN MCKEVITT

February 10, 1987

Jon Meyer, Esq.
Backus, Meyer & Solomon
116 Lowell St.
P.O. Box 516
Manchester, NH 03105

James V. Roth, Esq.
Leonard, Street and Deinard
Suite 1500
100 South Fifth Street
Minneapolis, Minnesota 55402

DECLARATORY RULING

The New Hampshire Commission for Human Rights ruled on February 10, 1987 that the Commission has no jurisdiction over discrimination against an individual because that individual is a transsexual.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Merryl Gibbs".

(Ms.) Merryl Gibbs
Executive Director

MG/rj

cc/ Asst. Attorney General
Peter Foley

Steven Shaw, Director
Division of Administrative Rules
State House Room 115

NEW HAMPSHIRE COMMISSION FOR HUMAN RIGHTS

Jane Doe

v.

Electro-Craft Corporation

ESMH 3013-86

DECLARATORY RULING

The issue before the Commission for Human Rights is whether transsexualism is a mental handicap as defined by RSA 354-A:3,XIII and the applicable regulations.

Transsexualism is a condition of gender identity disturbance. A transsexual male is a person who is anatomically male but who psychologically identifies himself as, and believes himself to be, a woman trapped inside a male body. Diagnostic and Statistic Manual of Mental Disorders, third edition (DSM III).

New Hampshire's Law Against Discrimination prohibits employment discrimination on the basis of mental handicap. RSA 354-A:8,I. "The term "physical or mental handicap" means handicap, other than illness, unrelated to a person's ability to perform a particular job or position available to him for hire or promotion so long as the individual will not present a hazard to himself or other employees or a handicap unrelated to a person's ability to acquire or to rent and maintain particular real property or housing accommodations." RSA 354-A:3,XII.

In adopting this definition, the Legislature did not intend to protect the broad class of individuals called transsexuals from employment discrimination. Senate Journal, 29 May 75. There is no evidence in the legislative history to suggest that transsexualism was contemplated as a covered class.

The Commission has promulgated regulations further defining "handicap." Under Hum 405.01 (b), "handicap" is "a permanent, long term, or chronic physical or mental impairment which substantially limits one or more major life activities."

The regulations also provide coverage for any individual who:

- a) Has a physical or mental impairment which substantially limits one or more major life activities;
- b) Has a record of such impairment;
- c) Is regarded as having such an impairment.
Hum 405.06

Because neither the statute nor the regulations define "major life activities", we look for guidance to federal regulations promulgated by the Department of Health and Human Services pursuant to Section 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as amended. "Major life activities" are defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 45 CFR 84.3 j (2) (ii).

In regard to whether transsexualism is "permanent, long term or chronic", surgical and hormonal treatment called gender reassignment is available which allows the person to anatomically change sex. In these cases, an improvement in the disorder should be expected. Thus, transsexualism does not meet the first criteria of the definition that it be permanent, long term or chronic.

No evidence has been presented that transsexualism, as a mental condition, substantially limits any of the major life activities enumerated above. Complainant, through two affidavits, attempts to establish that transsexuals have difficulty finding and keeping jobs because employers react negatively to their condition. Essentially this is an argument that transsexuals are being subjected to illegal discrimination because they are "regarded as having an impairment." For that section of the regulation to apply, complainant must first establish that transsexualism is a mental impairment before attitudes of others become tantamount to illegal discrimination. Because the premise that transsexualism is an impairment has not been established, negative attitudes of others do not create a handicap. Sommers v. Iowa Civil Rights Commission, 337 N.W. 2d 470, 476 (Iowa 1983).

Conclusion

Because we find that transsexualism is not a mental handicap under RSA 354-A:3, XIII and the applicable regulations, the Commission for Human Rights has no jurisdiction to hear an employment discrimination complaint brought by a transsexual.

Requests for Findings of Fact
and Rulings of Law

1. The following requests for Findings of Fact and Rulings of Law submitted by the complainant are granted:

1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 17, 18, 21, 22,
24, 25

2. The following requests submitted by the complainant are denied:

14, 15, 16, 19, 20, 23, 26, 27, 28, 29, 30, 31, 32

3. The following requests submitted by the respondent are granted:

1-33


Barry J. Palmer
Commissioner


Celina A. Tamposi
Commissioner

DISSENTING OPINION

I respectfully dissent because I find that transsexualism is a mental handicap, defined in Hum 405.01 as a "permanent, long term or chronic physical or mental impairment which substantially limits one or more major life activities."

When dealing with an issue like transsexualism, about which little is known by the general public, it is important to rely on an authoritative medical resource. The Diagnostic and Statistical Manual III, published by the American Psychiatric Association and used by its members to diagnose mental illnesses, declares that transsexualism is a mental disorder and contains ample evidence that it is a permanent, long term or chronic mental impairment.

First, in order for the diagnosis to be made, the disturbance must have been continuous (not limited to periods of stress) for at least two years. Diagnostic Criteria C. Secondly, DSM III describes transsexualism as "a persistent sense of discomfort and inappropriateness about one's anatomic sex and a persistent wish to be rid of one's genitals and to live as a member of the other sex." DSM III, page 261 (emphasis added). Thirdly, it is noted that "without treatment, the course of all three types is chronic and unremitting." DSM III, page 262. Some individuals who later develop transsexualism show gender identity problems in childhood. Others develop the full syndrome in late adolescence or early adulthood. DSM III, page 262. "It is generally agreed that transsexualism is irreversible and can only be treated with surgery to remove some of the transsexual feelings of psychological distress; psychotherapy is ineffective." Sommers v. Iowa Civil Rights Commission, 337 NW2d 470, 473 (Iowa, 1983) citing Doe v. Minnesota, 257 NW2d 816 (Minn. 1977) It is thus clear that for many individuals, transsexualism is a life-long problem.

Transsexualism substantially limits major life activities, specifically the ability to work. "Frequently social and occupational functioning are markedly impaired, partly because of associated psychopathology and partly because of problems encountered in attempting to live in the desired gender role." DSM III, page 263. Additionally there is generally moderate to severe coexisting personality disturbance accompanied by anxiety and depression. DSM III, page 262-263. I note that in Doe v. Minnesota, supra, the claimant, who sought state medicaid funding

for gender reassignment surgery, was certified totally disabled for psychological reasons resulting from his transsexuality. Doe, 257 NW2d at 817-818. These factors combine to limit a transsexual's ability to perform well in a job and to be in regular attendance.

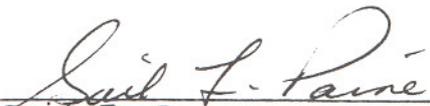
A person coming before the Commission to establish discrimination on the basis of handicap has several hurdles to clear. First, one must prove that his or her condition constitutes a handicap. RSA 354-A:3,XII. Then the complainant must show that the handicap is unrelated to the person's ability to perform the job and that the handicapped individual will not present a hazard to himself or others. Hum 405.03. The employer cannot be required to make any accommodations for the handicapped worker's limitations. Hum 405.02. Thus, a transsexual, having established handicap, still must show an ability to perform the job before any protection under the law arises.

Under Hum 405.06, protection against discrimination is extended to an individual who is regarded as having a mental impairment which substantially limits one or more major life activities. Complainant has submitted two affidavits, one from a psychiatrist and one from a psychotherapist, which demonstrate that transsexuals are discriminated against in employment because they are perceived as "crazy", mentally unstable or mentally incompetent. This evidence is sufficient to establish that transsexuals, even those who are fully capable of performing a job, are denied the opportunity to work based on misconceptions and misunderstandings about their abilities.

The respondent company argues that the New Hampshire Legislature did not intend to include transsexuals under the definition of handicap. The excerpt from the Senate Journal of May 29, 1975, does not reveal any discussion regarding the inclusion of transsexuals, nor does it mention any protected class by name. It is clear that the Legislature left it to the Commission to interpret RSA 354-A on a case-by-case basis.

The guidance given by the Legislature, and a clear statement of legislative intent, is found in section 13 of the law. "The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof." The purpose of the chapter is "to eliminate and prevent discrimination in employment ... because of ... mental handicap." RSA-354-A:1 I understand the legislative mandate to mean that in a close case, the Commission should find coverage.

Accordingly, I find that transsexualism is a mental handicap.



Gail F. Paine
Commissioner

SUPERIOR COURT

Jane Doe

VS

Electro-Craft Corporation

87-E-132

MOTION TO REVERSE HUMAN RIGHTS COMMISSION ORDER

NOW COMES the petitioner by and through her counsel and respectfully requests that the Court reverse the decision of the Human Rights Commission and remand the case of the Commission with the instruction that it take jurisdiction of the complaint or, in the alternative, remand the case to the Commission with instructions that it reconsider and provide a statement of reasons for its decision within 30 days of this Court's Order, for the reasons stated in her attached Memorandum of Law.

Respectfully submitted,
Jane Doe
By her attorney,
BACKUS, MEYER & SOLOMON

Jon Meyer
P. O. Box 516
116 Lowell Street
Manchester, N.H. 03105
Tel: (603) 668-7272

DATE: September 28, 1987

I hereby certify that a copy of the within Motion has been sent this date first class, postage prepaid, to Merryl Gibbs, Executive Director, New Hampshire Commission for Human Rights, 61 South Spring Street, Concord, N 03301; James V. Roth, Esq., Leonard, Street & Deinard, Suite 1500, 100 Sout 5th Street, Minneapolis, MN 55402 and Margaret-Ann Moran, Esq., Hatfield Bosse & Moran, Box 13, Hillsboro, NH 03244, opposing counsel.

Jon Meyer

NEW HAMPSHIRE COMMISSION FOR HUMAN RIGHTS

Jane Doe
v.
Electro-Craft Corporation

ESMH 3013-86

DECLARATORY RULING

The issue before the Commission for Human Rights is whether transsexualism is a mental handicap as defined by RSA 354-A:3, XII and the applicable regulations.

Transsexualism is a condition of gender identity disturbance. A transsexual male is a person who is anatomically male but who psychologically identifies himself as, and believes himself to be, a woman trapped inside a male body. Diagnostic and Statistic Manual of Mental Disorders, third edition (DSM III).

New Hampshire's Law Against Discrimination prohibits employment discrimination on the basis of mental handicap. RSA 354-A:8, I. "The term "physical or mental handicap" means handicap, other than illness, unrelated to a person's ability to perform a particular job or position available to him for hire or promotion so long as the individual will not present a hazard to himself or other employees or a handicap unrelated to a person's ability to acquire or to rent and maintain particular real property or housing accommodations." RSA 354-A:3, XII.

In adopting this definition, the Legislature did not intend to protect the broad class of individuals called transsexuals from employment discrimination. Senate Journal, 29 May 75. There is no evidence in the legislative history to suggest that transsexualism was contemplated as a covered class.

The Commission has promulgated regulations further defining "handicap." Under Hum 405.01 (b), "handicap" is "a permanent, long term, or chronic physical or mental impairment which substantially limits one ore more major life activities."

The regulations also provide coverage for any individual who:

- a) Has a physical or mental impairment which substantially limits one or more major life activities;
- b) Has a record of such impairment;
- c) Is regarded as having such an impairment. Hum 405.06

Because neither the statute nor the regulations define "major life activities", we look for guidance to federal regulations promulgated by the Department of Health and Human Services pursuant to Section 504 of the Rehabilitation Act of 1973, 87 Stat. 394, as

amended. "Major life activities" are defined as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working." 45 CFR 84.3 j (2) (ii).

In regard to whether transsexualism is "permanent, long term or chronic", surgical and hormonal treatment called gender reassignment is available which allows the person to anatomically change sex. In these cases, an improvement in the disorder should be expected. Thus, transsexualism does not meet the first criteria of the definition that it be permanent, long term or chronic.

No evidence has been presented that transsexualism, as a mental condition, substantially limits any of the major life activities enumerated above. Complainant, through two affidavits, attempts to establish that transsexuals have difficulty finding and keeping jobs because employers react negatively to their condition. Essentially this is an argument that transsexuals are being subjected to illegal discrimination because they are "regarded as having an impairment." For that section of the regulation to apply, complainant must first establish that transsexualism is a mental impairment before attitudes of others become tantamount to illegal discrimination. Because the premise that transsexualism is an impairment has not been established, negative attitudes of others do not create a handicap. Sommers v. Iowa Civil Rights Commission, 337 N.W. 2d 470, 476 (Iowa 1983).

Conclusion

Because we find that transsexualism is not a mental handicap under RSA 354-A:3, XIII and the applicable regulations, the Commission for Human Rights has no jurisdiction to hear an employment discrimination complaint brought by a transsexual.

Requests for Findings of Facts And Rulings of Law

1. The following requests for Findings of Fact and Rulings of Law submitted by the complainant are granted:

1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 17, 18, 21, 22, 24, 25

2. The following requests submitted by the complainant are denied:

14, 15, 16, 19, 20, 23, 26, 27, 28, 29, 30, 31, 32

3. The following requests submitted by the respondent are granted:

1-33

Barry Palmer, Commissioner
Celina A. Tamposi, Commissioner

DISSENTING OPINION

I respectfully dissent because I find that transsexualism is a mental handicap, defined in Hum 405.01 as a "permanent, long term or chronic physical or mental impairment which substantially limits one or more major life activities."

When dealing with an issue like transsexualism, about which little is known by the general public, it is important to rely on an authoritative medical resource. The Diagnostic and Statistical Manual III, published by the American Psychiatric Association and used by its members to diagnose mental illnesses, declares that transsexualism is a mental disorder and contains ample evidence that it is a permanent, long term or chronic mental impairment.

First, in order for the diagnosis to be made, the disturbance must have been continuous (not limited to periods of stress) for at least two years. Diagnostic Criteria C. Secondly, DSM III describes transsexualism as "a persistent sense of discomfort and inappropriateness about one's anatomic sex and a persistent wish to be rid of one's genitals and to live as a member of the other sex." DSM III, page 261 (emphasis added). Thirdly, it is noted that "without treatment, the course of all three types is chronic and unremitting." DSM III, page 262. Some individuals who later develop transsexualism show gender identity problems in childhood. Others develop the full syndrome in late adolescence or early adulthood. DSM III, page 262. "It is generally agreed that transsexualism is irreversible and can only be treated with surgery to remove some of the transsexual feelings of psychological distress; psychotherapy is ineffective." *Sommers v. Iowa Civil Rights Commission*, 337 NW2d 470, 473 (Iowa, 1983) citing *Doe v. Minnesota*, 257 NW2d 816 (Minn. 1977) It is thus clear that for many individuals, transsexualism is a life-long problem

Transsexualism substantially limits major life activities, specifically the ability to work. "Frequently social and occupational functioning are markedly impaired, partly because of associated psychopathology and partly because of problems encountered in attempting to live in the desired gender role." DSM III, page 263. Additionally there is generally moderate to severe coexisting personality disturbance accompanied by anxiety and depression. DSM III, page 262-263. I note that in *Doe v. Minnesota, supra*, the claimant, who sought state medicaid funding for gender reassignment surgery, was certified totally disabled for psychological reasons resulting from his transsexuality. *Doe*, 257 NW2d at 817-818. These factors combine to limit a transsexual's ability to perform well in a job and to be in regular attendance.

A person coming before the Commission to establish discrimination on the basis of handicap has several hurdles to clear. First, one must prove that his or her condition constitutes a handicap. RSA 354-A:3, XII. Then the complainant must show that the handicap is unrelated to the person's ability to perform the job and that the handicapped individual will not present a hazard to himself or others. Hum 405.03. The employer cannot be required to make any accommodations for the handicapped worker's

limitations. Hum 405.02. Thus, a transsexual, having established handicap, still must show an ability to perform the job before any protection under the law arises.

Under Hum 405.06, protection against discrimination is extended to an individual who is regarded as having a mental impairment which substantially limits one or more major life activities. Complainant has submitted two affidavits, one from a psychiatrist and one from a psychotherapist, which demonstrate that transsexuals are discriminated against in employment because they are perceived as "crazy", mentally unstable or mentally incompetent. This evidence is sufficient to establish that transsexuals, even those who are fully capable of performing a job, are denied the opportunity to work based on misconceptions and misunderstandings about their abilities.

The respondent company argues that the New Hampshire Legislature did not intend to include transsexuals under the definition of handicap. The excerpt from the Senate Journal of May 29, 1975, does not reveal any discussion regarding the inclusion of transsexuals, nor does it mention any protected class by name. It is clear that the Legislature left it to the Commission to interpret RSA 354-A on a case-by-case basis.

The guidance given by the Legislature, and a clear statement of legislative intent, is found in section 13 of the law. "The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof." The purpose of the chapter is "to eliminate and prevent discrimination in employment...because of...mental handicap." RSA 354-A:1. I understand the legislative mandate to mean that in a close case, the Commission should find coverage.

Accordingly, I find that transsexualism is a mental handicap.

Gail F. Paine, Commissioner

Office of
Clerk of Superior Court
Rockingham County
Exeter, New Hampshire 03833

Raymond W. Taylor, Clerk
Karen E. Godzyk, Deputy Clerk
Laurie G. Yadoff, Deputy Clerk
Harriet J. Fishman, Deputy Clerk
Rosalie C. Wilson, Deputy Clerk

APR 13 1988
NEW HAMPSHIRE
COMMISSION
FOR HUMAN RIGHTS

Domestic Relations
(603) 778-8580
Civil, Equity Criminal
(603) 772-3714

April 12, 1988

Backus, Meyer & Solomon
116 Lowell Street
BOX 516
Manchester, New Hampshire 03101

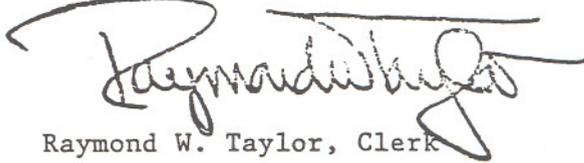
Hatfield, Bosse & Moran
P.O. Box 13, Central Square
Hillsborough, New Hampshire 03244

Re: 87-E-132 Jane Doe vs. Electro-Craft Corporation

Gentlemen:

Enclosed please find a copy of the Court's (Hollman, J) Order on Plaintiff's
Motion to Reverse dated April 8, 1988.

Very truly yours,



Raymond W. Taylor, Clerk

/wre
enclosure:
cc: New Hampshire Human Rights Commission

THE STATE OF NEW HAMPSHIRE

Rockingham, ss.

Superior Court

Jane Doe

vs.

Electro-Craft Corporation
No. 87-E-132

ORDER ON PLAINTIFF'S MOTION TO REVERSE

This is an appeal from a decision of the New Hampshire Commission for Human Rights (hereafter "Commission") that it has no jurisdiction to hear a complaint for employment discrimination based upon plaintiff's transsexual status. In her complaint to the Commission, plaintiff claimed that she was fired from her job at Electro-Craft Corporation because she is a transsexual who has undergone gender reassignment surgery. Plaintiff further claimed in her complaint that the Commission had jurisdiction to hear her case because transsexualism is a mental handicap entitled to protection under RSA 354-A, the "Law Against Discrimination".

Without stating its reasons, the Commission, after a hearing, ruled on February 10, 1986, that it had no jurisdiction to hear plaintiff's complaint. Plaintiff appealed that decision to this court which set aside the Commission's order and remanded

for reconsideration on December 9, 1987. In remanding, this court directed that, if the Commission again declined jurisdiction, it was to specify its findings and rulings to permit meaningful judicial review.

Thereafter, in a 2 to 1 decision, the Commission again declined jurisdiction. The majority issued a declaratory ruling which contained its rationale as well as its action upon the parties' requests for findings of fact and rulings of law. The dissenting Commissioner also issued a narrative opinion. Plaintiff then filed a motion with this court to reverse the majority's order, and after hearing, the parties filed legal memoranda supporting their respective positions.

The only evidence considered by the Commission at its hearings on jurisdiction were extracts about transsexualism from the Third Edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM III), prepared by the American Psychiatric Association, and two affidavits presented by plaintiff from Dr. Charles Ihlenfeld and Diane Blake. Dr. Ihlenfeld, a board certified psychiatrist licensed to practice in four states, has seen over 500 transsexual patients in a clinical setting since 1969, and was an associate of the pioneering medical figure in transsexual research and treatment in the United States. Diane

Blake, a psychotherapist engaged in private practice in Londonderry, New Hampshire, is an experienced therapist who has counselled 15 to 20 transsexuals in New Hampshire, served as the executive director of an international suicide prevention service, and taught courses in human sexuality and sociology at the college level. According to both Dr. Ihlenfeld and Diane Blake, many people, including employers, the general public, and even some well educated physicians, consider transsexuals to be mentally handicapped, unstable, incompetent, "crazy", and less capable in employment than non-transsexual persons.

The Commission found DSM III to be an authoritative medical guide to mental disorders. Plaintiff's Proposed Finding No. 6, granted by the Commission. According to DSM III, transsexualism is a gender identity disorder, the essential features of which are "a persistent sense of discomfort and inappropriateness about one's anatomic sex and a persistent wish to be rid of one's genitals and to live as a member of the other sex. The diagnosis is made only if the disturbance has been continuous . . . for at least two years"

Moreover, as stated in DSM III, transsexuals generally experience "moderate to severe coexisting personality disturbance,

[f]requently [accompanied by] considerable anxiety and depression, which the individual may attribute to inability to live in the role of the desired sex. . . . Without treatment, the course [of the disorder] is chronic and unremitting. Since surgical sex reassignment is a recent development, the long-term course of the disorder with this treatment is unknown. . . ."

Furthermore, as noted in DSM III, "[f]requently social and occupational functioning [of transsexuals is] markedly impaired, partly because of associated psychopathology and partly because of problems encountered in attempting to live in the desired gender role. Depression is common, and can lead to suicide attempts." By its rulings, the Commission effectively adopted the definition of transsexualism as contained in DSM III, which was the only evidence before the Commission of the distinguishing features and characteristics of this disorder.

The high-principled policy underlying New Hampshire's "Law Against Discrimination" is "that practices of discrimination against any of its inhabitants because of . . . physical or mental handicap . . . are a matter of state concern, that such discrimination not only threatens the rights and proper privileges of its inhabitants but menaces the institutions and foundation of a free democratic state and threatens the peace, order, health,

safety and general welfare of the state and its inhabitants."
RSA 354-A:1.

In furtherance of this policy, our Legislature has declared that "the opportunity to obtain employment without discrimination because of . . . physical or mental handicap . . . is a civil right," RSA 354-A:2, and it is unlawful in this state for an employer to discriminate against an employee in employment on the basis of physical or mental handicap. RSA 354-A:8(I). Our Legislature has also provided that the provisions of "The Law Against Discrimination" are to "be construed liberally for the accomplishment of the purposes thereof." RSA 354-A:13. In enacting RSA 354-A, the Legislature gave the Commission general jurisdiction and power "to eliminate and prevent discrimination in employment . . . because of . . . physical or mental handicap." RSA 354-A:1.

Under RSA 354-A:3(XIII), "[t]he term 'physical or mental handicap' means handicap, other than illness, unrelated to a person's ability to perform a particular job or position available to him for hire or promotion so long as the individual will not present a hazard to himself or other employees" The statute does not further define "physical or mental handicap". However, in enacting RSA 354-A, the Legislature left it to the

Commission to expound upon the meaning of this term through its rule and regulation making function, so as to carry out the purposes and policies of the "Law Against Discrimination". See RSA 354-A:7(V). See also N. H. Senate Journal, 29 May 75, at 956.

In its Rule HUM 405.01, the Commission has explicated as follows upon the meaning of the term "handicap": "For the purposes of those Laws 'illness' shall be defined as a short-term, temporary medical condition, and 'handicap' shall be defined as a permanent, long-term or chronic physical or mental impairment which substantially limits one or more major life activities." In its Rule HUM 405.06, the Commission has set forth the categories of discrimination in employment because of handicap which are covered by RSA 354-A. This rule provides:

- Discrimination in employment on the basis of handicap shall include discrimination against any individual who:
- (a) has a physical or mental handicap which substantially limits one or more major life activities;
 - (b) has a record of such an impairment;
 - (c) is regarded as having such an impairment.

The Commission neither addressed nor considered whether plaintiff herself was a handicapped person or whether she had been discriminated against in employment because of her alleged handicap. Rather, it concerned itself solely with the threshold

issue of whether it had the basic power or jurisdiction in the first instance to investigate a complaint alleging handicap discrimination in employment based upon transsexual status. Therefore, the narrow question considered by the Commission was whether plaintiff had alleged the type of handicap defined in HUM 405.01 and whether her complaint described the type of claim covered by HUM 405.06.

RSA 354-A:10(III) provides in pertinent part that on review by the Superior Court "[t]he findings of the commission as to the facts shall be conclusive if supported by sufficient evidence on the record considered as a whole." "[T]he scope of review envisioned under RSA 354-A:10 is analogous to that under RSA 541:13." E. D. Swett, Inc. v. N.H. Commission for Human Rights, 124 NH 404, 408 (1983). Under RSA 541:13, the burden of proof is upon the plaintiff in this appeal to show that the "order or decision of the commission . . . is clearly unreasonable or unlawful, and all findings of the commission upon all questions of fact properly before it shall be deemed to be prima facie lawful and reasonable; and the order or decision appealed from shall not be set aside or vacated except for errors of law, unless the court is satisfied, by a clear preponderance of the evidence before it, that such order is unjust or unreasonable."

One way for the plaintiff to meet her burden of showing

by a clear preponderance of the evidence that the order of the Commission is unjust or unreasonable is to show that the record contains no evidence to sustain the Commission's order. Appeal of Granite State Electric Company, 121 NH 787, 791 (1981). The order dismissing plaintiff's complaint for lack of subject matter jurisdiction contains serious inconsistencies in the operative factual findings of the Commission and is predicated upon crucial findings of fact which are unsupported by any evidence in the record. Stated broadly, the end result is that there is no evidence in the record to sustain the Commission's order, so that plaintiff has met her burden of showing that the decision of the Commission is clearly unreasonable or unlawful. Moreover, also stated broadly, in dismissing plaintiff's complaint for lack of jurisdiction, the Commission committed legal error by ignoring the underlying policy of the "Law Against Discrimination". The court so determines for the specific reasons which follow.

The Commission found that DSM III is an authoritative medical guide which categorizes transsexualism as a gender identity disorder, essential features of which are a "persistent sense of discomfort and inappropriateness about one's anatomic sex and a persistent wish to be rid of one's genitals and to live as a

member of the other sex." Plaintiff's Proposed Findings Nos. 6, 7, and 8, granted by the Commission. The Commission further found that the diagnosis of transsexualism is only made if it is determined to be continuous for at least two years, that transsexuals generally experience a moderate to severe co-existing personality disturbance frequently characterized by anxiety and depression, and that, without treatment, the course of transsexualism is chronic and unremitting. Plaintiff's Proposed Findings Nos. 9, 10, and 11, granted by the Commission. Moreover, the Commission found that, even with surgical sex reassignment, the long-term course of transsexualism is unknown and that transsexuals frequently experience marked impairment of social and occupational functioning. Plaintiff's Proposed Findings Nos. 12 and 13 granted by the Commission. All of these findings were supported by the evidence of record, to wit, the content of DSM III.

The only reasonable reading of DSM III is that transsexualism is a mental handicap as that term is used by knowledgeable medical experts. Yet, the Commission found otherwise. Plaintiff's Proposed Finding No. 16, denied by the Commission. The affidavits of Dr. Ihlenfeld and Diane Blake were the only other evidence before the Commission on this point; and both of those affidavits supported the obvious import of DSM III that the

American Psychiatric Association treats transsexualism as a mental handicap.

The Commission expressly found that gender reassignment surgery is available to allow transsexuals to anatomically change sex and that when such sex change operations are performed "an improvement in the disorder should be expected." As a corollary, the Commission found that, because of the availability of sex change surgery, transsexualism is not permanent, long-term, or chronic and that it therefore fails to meet the first definitional criterion of Rule HUM 405.01. The Commission had no evidence before it that gender reassignment surgery will perforce ameliorate or cure the long-term deleterious effects of transsexualism as described in DSM III. Indeed, the only evidence before the Commission regarding the salutary nature of sex reassignment surgery was the statement contained in DSM III that "since surgical sex reassignment is a recent development, the long-term course of the disorder with this treatment is unknown." The Commission adopted this statement as a fact by granting Plaintiff's Proposed Finding No. 12, in contradiction of its explicit finding, which was unsupported by the evidence, that an improvement in the disorder should be expected with sex change surgery.

Moreover, as plaintiff denotes in her trenchant legal memorandum, it is a non sequitur to conclude that, just because there is a drastic medical procedure which may improve a disorder, it is therefore not a permanent, long-term, or chronic condition. There is no requirement in HUM 405.01 or elsewhere that for a disorder to qualify as a protected handicap, it must be one which cannot be improved through surgery or other treatment. If one were to carry out the foregoing factual finding of the Commission to its logical conclusion, many unquestionably covered handicaps would be unprotected by the "Law Against Discrimination". On the basis of the evidence before the Commission, one has to patently disregard the definition and description of transsexualism in DSM III to say that it is not permanent, long-term, or chronic.

Proceeding to the further requirement of HUM 405.01, that the impairment must be one "which substantially limits one or more major life activities," the Commission adopted the definition of "major life activities" used by the Department of Health and Human Services in carrying out the provisions of the Federal Rehabilitation Act. According to this definition, "major life activities" are "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working." 45 CFR 84.3 j(2)(ii). By use of the word "such", the definition does not purport to be exclusive.

The Commission then proceeded to find that "no evidence has been presented that transsexualism as a mental condition substantially limits any of the major life activities enumerated above." Consistent with this finding, the Commission granted defendant's many requests setting forth the same conclusion. Not only were these findings tautological, but they were manifestly unsupported by the evidence of record and at odds with DSM III.

DSM III expressly states, as the Commission found, that transsexuals frequently have marked impairment of social and occupational functioning. Surely, no reasonable person would seriously argue that social and occupational functioning is not a major life activity. Furthermore, according to the definition adopted by the Commission, caring for oneself is a major life activity. According to DSM III, the type of depression common among transsexuals can lead to suicide attempts. Axiomatically, when one possesses suicidal ideation or attempts suicide, he is not caring for himself. And it goes without saying that securing happiness and pleasure, avoiding depression, insuring one's personal safety, and preserving one's life are vital major life activities. They are the very sort of activities which DSM III suggests are impaired by the characteristics of transsexualism.

In making its findings which were unsupported by the evidence of record as discussed above, the Commission appears to have relied on an inappropriate taking of official notice instead of on the evidence presented. While the Commission could take official notice as to matters of common knowledge, RSA 541-A:18 V(a)(1), it could "not expand the concept of common knowledge beyond reasonable limits," 2 Am. Jur. 2d. "Administrative Law", § 385, and could not in any event rely upon official notice without informing the parties that it was doing so and affording them the opportunity to contest the material so noticed. Ibid.; RSA 541-A:18 V(b). The Commission did not in any way advise the parties that it was taking official notice as to any fact pertinent to the issue before it.

Moreover, the distinguishing features and characteristics of transsexualism involve complex medical information, as is evident from DSM III. They are not the sort of generally recognized technical or scientific facts within the Commission's specialized knowledge as to which it could take official notice. See RSA 541-A:18 V(a)(3), and by analogy N. H. Court Rules Annotated, Rules of Evidence, Rule 201(a).

As stated above, the Legislature gave the Commission general jurisdiction "to eliminate and prevent discrimination in employment . . . because of . . . physical or mental handicap." RSA 354-A:1.

To effectuate the important policy expressed in RSA 354-A, the Legislature directed the Commission to construe the statute liberally. As plaintiff argues in her legal memorandum, despite this legislative mandate, the Commission sought to create ambiguities in the statute to prevent coverage.

For instance, in ruling that "the Legislature did not intend to protect the broad class of individuals called transsexuals from employment discrimination," the Commission looked to the legislative history and reasoned that, because there was no mention in that history of transsexualism, it was not a handicap protected by the statute. While the legislative history is useful as to the difference between "handicaps" which are protected and "illnesses" which are not, it nowhere refers to any particular handicap intended to be covered. If carried to its logical conclusion, the Commission's reliance on the legislative history would have to exclude blindness as a protected handicap, since blindness is nowhere mentioned in such history. Furthermore, the Commission denied plaintiff's Proposed Ruling No. 19, that it is "required under RSA 354-A:13 to resolve any ambiguity in the scope of the statute in favor of coverage." This ruling ignores the Legislature's obvious intent that the "Law Against Discrimination" should be liberally construed in favor of coverage.

Plaintiff argues that a person asserting an employment discrimination claim based on mental handicap due to transsexualism need not meet the threshold definitional requirements of HUM 405.01 to obtain the safeguards of the "Law Against Discrimination". In this regard, plaintiff relies on Doe v. U. S. Postal Service, 37 F.E.P. 1868 (D.D.C. 1985). In Doe, the court held that if a person is merely "regarded" by others as having an impairment which substantially limits major life activities, that perceived impairment suffices as a protected handicap. Doe, however, is not germane, because in that case the court was interpreting the federal statute which effectively combines the definitional provisions found in HUM 405.01 with the coverage provisions found in HUM 405.06 so as to produce the hybrid definition of "handicap" contained in the Federal Rehabilitation Act. Under the New Hampshire "Law Against Discrimination", the definition of a "handicap" protected by the statute is exclusively contained in HUM 405.01; and HUM 405.06 simply describes the types of claims relating to a protected handicap which are covered. Therefore, "handicap" as used in the federal statute is not the same as "handicap" in New Hampshire's "Law Against Discrimination" as amplified by HUM 405.01.

In support of its position, defendant heavily relies upon

Sommers v. Iowa Civil Rights Commission, 337 N.W.2d 470 (1983), which the Commission cited for the limited proposition that the perception of others under HUM 405.06 does not come into play until the handicap alleged by a claimant meets the definitional requirements of HUM 405.01. Defendant, however, relies on Sommers for a much broader purpose -- to support the ruling of the Commission that transsexualism is not a protected handicap in the first instance under HUM 405.01.

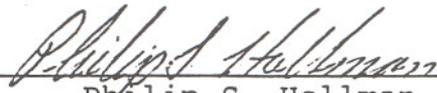
Sommers is readily distinguishable from the case at hand for several reasons. First, the definition of "handicap" under Iowa law is a hybrid, consisting of elements found in HUM 405.01 and elements found in 405.06. The Iowa definition is not the same as that in New Hampshire. Second, under the Iowa statute, the handicap itself must be "substantial", but under New Hampshire law, there is no such requirement. Third, under the rules of the Iowa Civil Rights Commission, protected physical and mental impairments are specifically enumerated, which is not the case in New Hampshire. And fourth, it does not appear from the Sommers decision that, in dismissing the Iowa plaintiff's claim for lack of jurisdiction, the Iowa Civil Rights Commission took any evidence. In the instant case, the Commission admitted DSM III, which it found to be authoritative, unlike Sommers where there was no such authoritative evidence.

As previously discussed, the ruling of the Commission that it was without jurisdiction to hear plaintiff's claim is clearly unreasonable or unlawful. The record contains no evidence to sustain the Commission's order, and the Commission committed legal error by ignoring the underlying policy of RSA 354-A. Moreover, DSM III, which the Commission found to be authoritative and which was unchallenged at the Commission hearings, compelled the Commission to find that transsexualism is a protected handicap under RSA 354-A and HUM 405.01, which this court so finds by a clear preponderance of the evidence before it.

Accordingly, plaintiff's motion to reverse is GRANTED. The order of the Commission that it has no jurisdiction to hear plaintiff's claim is set aside, and this case is remanded to the Commission with instructions that it find jurisdiction and begin a probable cause investigation under RSA 354-A:9.

So ordered.

April 8, 1988


Philip S. Hollman,
Presiding Justice